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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

C.E. and L.E.,

Petitioners,

v.

ILLINOIS DEPARTMENT OF MENTAL HEALTH AND DEVELOPMENTAL DISABILITIES,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Illinois

REPLY BRIEF FOR PETITIONERS

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TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

ARGUMENT

I.

THIS COURT HAS JURISDICTION PURSUANT TO SECTION 1257(a) BECAUSE ALL FEDERAL ISSUES HAVE BEEN FINALLY DETERMINED BY THE ILLINOIS SUPREME COURT, NO FURTHER EFFECTIVE REVIEW IS AVAILABLE IN THE STATE COURTS, AND A DELAY IN THIS COURT'S REVIEW WOULD RESULT IN THE SERIOUS EROSION OF THE FEDERAL POLICY PROTECTING THE CONSTITUTIONAL RIGHT TO REFUSE UNWANTED MEDICAL TREATMENT . 1

II.

THE RECORD IS SUFFICIENTLY DEVELOPED TO ALLOW RESOLUTION OF THE CONSTITUTIONAL ISSUES RULED UPON BY THE ILLINOIS SUPREME COURT 6

III.

THIS COURT SHOULD GRANT THE PETITION IN ORDER TO ESTABLISH THE SUBSTANTIVE CONTOURS OF THE CONSTITUTIONAL RIGHT TO REFUSE PSYCHOTROPIC MEDICATION, RESOLVE THE SPLIT AMONG THE CIRCUIT COURTS OF APPEALS, AND RESOLVE THE CONFLICT BETWEEN THE ILLINOIS SUPREME COURT'S OPINION AND *O'CONNOR*, *CRUZAN*, AND *ROE* 7

IV.

THIS COURT SHOULD GRANT THE PETITION IN ORDER TO CORRECT THE ILLINOIS SUPREME COURT'S DECISION; THE CREATION OF TWO DISPARATE JUDICIAL PROCEDURES TO MAKE TREATMENT DECISIONS FOR PERSONS WHO LACK DECISIONAL CAPACITY VIOLATES THE EQUAL PROTECTION CLAUSE 9

CONCLUSION 10

TABLE OF AUTHORITIES

CASES: PAGE

Cohen v. Beneficial Loan Corp., 337 U.S. 541 (1948) 5

Construction Laborers v. Curry, 371 U.S. 542 (1962) 2

Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1974) 2, 5

Cruzan v. Director, Missouri Department of Health, 497 U.S. 261 (1990) 5, 8

Flanagan v. Ohio, 465 U.S. 259 (1983) 5

Flynt v. Ohio, 451 U.S. 619 (1981) 5

Fort Wayne Books, Inc. v. Indiana, 489 U.S. 46 (1988) 6

Goodyear Atomic Corp. v. Miller, 486 U.S. 174 (1987) 6

Hudson Distributors v. Eli Lilly, 377 U.S. 386 (1963) 6

In the Matter of Guardianship of Roe, 383 Mass. 415, 421 N.E.2d 40 (1981) 8

Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1973) 6

Mills v. Rogers, 457 U.S. 291 (1982) 4, 7

O'Connor v. Donaldson, 422 U.S. 563 (1975) 8

Republic Natural Gas Co. v. Oklahoma, 334 U.S. 62 (1948) 5

Rescue Army v. Municipal Court, 331 U.S. 549 (1947) 6, 7

Riggins v. Nevada, 112 S. Ct. 1810 (1992) 5

Sherman v. Four County Counseling Center, 987 F.2d 397 (7th Cir. 1993) 4, 7

Southland Corp. v. Keating, 465 U.S. 1 (1983) ... 6

Washington v. Harper, 494 U.S. 210 (1990) 5

Zinermon v. Burch, 494 U.S. 113 (1990) 8

STATUTES:

735 ILCS 5/2-701 (West 1992) 2

42 U.S.C. sec. 1395cc(a)(1) 5

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REPLY BRIEF FOR PETITIONERS

I.

THIS COURT HAS JURISDICTION PURSUANT TO SECTION 1257(a) BECAUSE ALL FEDERAL ISSUES HAVE BEEN FINALLY DETERMINED BY THE ILLINOIS SUPREME COURT, NO FURTHER EFFECTIVE REVIEW IS AVAILABLE IN THE STATE COURTS, AND A DELAY IN THIS COURT'S REVIEW WOULD RESULT IN THE SERIOUS EROSION OF THE FEDERAL POLICY PROTECTING THE CONSTITUTIONAL RIGHT TO REFUSE UNWANTED MEDICAL TREATMENT.

In determining whether a state court's decision is final, despite anticipated additional proceedings, this Court has adopted a practical, rather than a technical, ap-

proach, and has balanced the inconvenience and costs of piecemeal review, on the one hand, against the "danger of denying justice by delay," on the other. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 478 (1974). Both of these practical considerations militate in favor of a finding of finality in this case.

Review by this Court at this time creates no risk of piecemeal review. The constitutionality of Section 2-107.1 was challenged in petitions for declaratory relief filed by L.E. and C.E. Under Illinois law, a petition for declaratory relief creates an independent cause of action, and a declaration of rights is not to be made unless doing so terminates the entire controversy between the parties or some part thereof. 735 ILCS 5/2-701 (West 1992). The Illinois Supreme Court's decision on L.E.'s and C.E.'s petitions for declaratory relief resolved the distinct issue of the statute's constitutionality and terminated the controversy in the state courts on that issue.

In *Construction Laborers v. Curry*, 371 U.S. 542 (1962), even though further proceedings were pending in the state courts, this Court took jurisdiction to review a state's decision that its courts had authority to enjoin labor union picketing. Similarly, this Court may take jurisdiction to review Illinois's decision that its courts have authority to order non-emergency involuntary psychotropic medication. Like *Curry*, this case presents "multiple litigation allowing review of the adjudication which is concluded because it is independent of, and unaffected by, another litigation with which it happens to be entangled." *Curry*, 371 U.S. at 549.

The only issue to be decided on remand is one of state law: does C.E. meet the statutory prerequisites of Section 2-107.1? Respondent's claim that additional federal

issues may arise on remand is based on a misreading of the Illinois Supreme Court's opinion. Respondent repeatedly asserts that the Illinois Supreme Court held that trial courts "must" consider the patient's competent wishes before ordering psychotropic medication under Section 2-107.1. (Opp. 7, 10, 11 and 15) These assertions are not true. Instead, the court held that Section 2-107.1 merely "permits" consideration of the patient's competent wishes and that these wishes "will often be highly pertinent" when assessing whether the medication's benefits outweigh its risks. (App. A-19 and A-18)

Based upon its misapprehension, Respondent posits that further state court proceedings could give rise to additional constitutional issues if, for example, the trial court "wholly ignores C.E.'s wishes while competent." (Opp. 11) Because the Illinois Supreme Court did not hold that consideration of the patient's wishes is *required* and did not hold that, even if considered, the patient's wishes would be *determinative* of the hearing's outcome, according to the court, no constitutional violation occurs if the trial court ignores the patient's wishes.

Respondent also posits that additional constitutional issues will arise on remand if the trial court concludes that there is no evidence showing what C.E.'s competent wishes would be. (Opp. 11) The Illinois Supreme Court, however, has addressed this scenario as well and has ruled that the trial court, when lacking evidence of substituted judgment, should apply the best interests standard. (App. A-21)

The only federal questions at issue in this case have been finally decided by the Illinois Supreme Court, and that court's decision is not subject to review or alteration

by the state courts. The Illinois Supreme Court shunned the opportunity to alter or clarify its opinion when it denied C.E.'s Petition for Rehearing (App. C-1), and principles of *res judicata* bar any further review in the state courts. Thus, this Court may take jurisdiction of this case now without risking piecemeal review of federal issues.

Moreover, this Court's refusal to review this case at this time would create a "danger of denying justice by delay." In 1981, this Court recognized that the substantive contours of the right to refuse unwanted psychotropic medication had not been clearly defined, *Mills v. Rogers*, 457 U.S. 291 (1982), and they have not been clearly defined to this day. *Sherman v. Four County Counseling Center*, 987 F.2d 397 (7th Cir. 1993). Lacking direction from the federal courts, the Illinois legislature enacted Section 2-107.1 in August 1991, and L.E. first challenged its constitutionality that same month. A decision by this Court would end decades of confusion for this nation's courts, and a reversal would end nearly four years of litigation for L.E. and C.E.

Review by this Court at this time is the only way to effectively protect C.E.'s constitutional rights. Those rights include the right not to be subjected to a court hearing at which his right to refuse unwanted, non-emergency psychotropic medication is put into jeopardy.[1] If

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[1] In appeals from the Circuit Courts of Appeals, this Court has recognized the collateral order exception to the final judgment rule. This exception allows the Court to review a pre-trial order denying dismissal of an indictment on double jeopardy or speech or debate grounds. Such a pre-trial order affects the defendant's right "not to be tried"—a right which

(continued...)

this Court refuses to review this case, the Illinois Supreme Court's decision would subject C.E. and countless other persons with mental illnesses and developmental disabilities to hearings for the involuntary administration of non-emergency psychotropic medication—hearings which, if Section 2-107.1 is unconstitutional, should never be held at all. *See Cox*, 420 U.S. at 485.

Additionally, a refusal to review the state court decision would erode the federal policy of protecting the individual's right to determine his/her own medical care. This policy is evidenced by this Court's opinions in *Riggins v. Nevada*, 112 S. Ct. 1810 (1992), *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261 (1990), and *Washington v. Harper*, 494 U.S. 210 (1990), and by Congress's enactment of the Patient Self-Determination Act, 42 U.S.C. sec. 1395cc(a)(1).

The cases cited by Respondent to defeat this Court's jurisdiction are not applicable here. This Court refused to exercise its jurisdiction in *Flynt v. Ohio* because there was "no identifiable federal policy" at risk. *Flynt v. Ohio*, 451 U.S. 619, 622 (1981). Similarly, this Court refused to exercise its jurisdiction in *Republic Natural Gas Co. v. Oklahoma* because the state court's decision rested "on matters peculiarly of local concern." *Republic Gas v. Oklahoma*, 334 U.S. 62, 67 (1948). In contrast, if left un-

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[1] (...continued)
would be "irretrievably lost if review were postponed until trial is completed." *Flanagan v. U.S.*, 465 U.S. 259 (1983). *See also Cox*, 420 U.S. at 482 (because important rights may be irreparably lost, review after the termination of the litigation may not be effective) (citing *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949)).

reviewed, the Illinois Supreme Court's opinion in this case would seriously erode the federal policy protecting an individual's right of self-determination, and the important federal issue presented here may escape review entirely. *See Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46 (1988) (review undertaken to remove doubt about RICO's seizure provisions); *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174 (1987) (unreviewed decision by Ohio Supreme Court would erode federal regulation of nuclear production facilities); *Southland Corp. v. Keating*, 465 U.S. 1 (1983) (California Supreme Court decision reviewed to uphold federal policy in favor of right to contract).

II.

THE RECORD IS SUFFICIENTLY DEVELOPED TO ALLOW RESOLUTION OF THE CONSTITUTIONAL ISSUES RULED UPON BY THE ILLINOIS SUPREME COURT.

Respondent argues that the "lack of a factual record" makes the Court's exercise of its jurisdiction inappropriate at this time. (Opp. 13) Such an argument is tantamount to suggesting a *per se* rule that this Court will not review facial challenges to statutes brought in petitions for declaratory relief. Plainly, this Court follows no such rule. *See eg. Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1973); *Hudson Distributors v. Eli Lilly*, 377 U.S. 386 (1963).

Rescue Army v. Municipal Court, 331 U.S. 549 (1947), relied on by Respondent, is distinguishable from the present case. There this Court declined to review the constitutional validity of city ordinances governing the solicitation of charitable contributions because, *inter alia*,

the record did not reveal which provisions had been used to charge the petitioner nor which provisions were being challenged and because the state court had not yet interpreted the ordinances. *Rescue Army*, 331 U.S. at 576-578.

In contrast, Section 2-107.1 has been interpreted by the Illinois Supreme Court and its constitutional validity upheld. No additional facts are needed for this Court to review the Due Process and Equal Protection infirmities raised by Petitioners.

III.

THIS COURT SHOULD GRANT THE PETITION IN ORDER TO ESTABLISH THE SUBSTANTIVE CONTOURS OF THE CONSTITUTIONAL RIGHT TO REFUSE PSYCHOTROPIC MEDICATION, RESOLVE THE SPLIT AMONG THE CIRCUIT COURTS OF APPEALS, AND RESOLVE THE CONFLICT BETWEEN THE ILLINOIS SUPREME COURT'S OPINION AND *O'CONNOR*, *CRUZAN*, AND *ROE*.

Respondent cannot deny that this case presents an important federal question, *see Mills v. Rogers*, 457 U.S. 291 (1982), and Respondent cannot deny that the Circuit Courts of Appeals have issued conflicting opinions regarding the contours of the constitutional right to refuse psychotropic medication. *See Sherman v. Four County Counseling Center*, 987 F.2d 397 (7th Cir. 1993). Respondent's silence on these issues is stark evidence that this Court should grant the petition in this case. Respondent contends that the petition should nonetheless be denied because this case presents no conflict with opinions of this Court or of any state supreme court. Respondent, however, is mistaken.

This Court has held that there is no constitutional basis for involuntarily confining persons with mental illnesses if they are not dangerous and can survive safely in freedom. *O'Connor v. Donaldson*, 422 U.S. 563 (1975), *construed in Zinermon v. Burch*, 494 U.S. 113, 133 (1990). Because states cannot deprive non-dangerous persons of their liberty by involuntarily confining them, it follows that states cannot deprive non-dangerous persons of their liberty by involuntarily medicating them. In this case, the Illinois Supreme Court upheld the involuntary administration of mental health and developmental disability services to persons who are not dangerous, and its opinion conflicts with *O'Connor*.

The Massachusetts Supreme Court has held that psychotropic medication may be involuntarily administered to a person who lacks decisional capacity only "where a judicial substituted judgment determination indicates that the incompetent individual would, if competent, accept [such] drugs." *In the Matter of Guardianship of Roe*, 383 Mass. 415, 453, 421 N.E.2d 40, 61 (1981). Similarly, this Court has held that Due Process requires the state to repose judgment regarding medical treatment with the patient himself and not with anyone else. *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261, 286 (1990). In the present case, the Illinois Supreme Court allowed, but did not require, the state's trial courts to repose medical judgments with the patient by allowing the trial courts to use the substituted judgment standard. Because the court did not *require* use of the substituted judgment standard, its opinion conflicts with *Roe* and *Cruzan*.

IV.

THIS COURT SHOULD GRANT THE PETITION IN ORDER TO CORRECT THE ILLINOIS SUPREME COURT'S DECISION; THE CREATION OF TWO DISPARATE JUDICIAL PROCEDURES TO MAKE TREATMENT DECISIONS FOR PERSONS WHO LACK DECISIONAL CAPACITY VIOLATES THE EQUAL PROTECTION CLAUSE.

Respondent claims that Petitioners' Equal Protection argument rests on a flawed premise: "that persons for whom a court order is sought under Section 2-107.1 is [sic] similarly situated, for equal protection purposes, to a person for whom guardianship is sought." (Opp. 21) Petitioners' premise, however, is not flawed. The Illinois Supreme Court found that 2-107.1's requirement that recipients lack the capacity to make reasoned decisions "bears substantial similarity" to the guardianship statute's definition of a disabled person. (App. A-30) Thus, for purposes of Equal Protection, persons subjected to 2-107.1 hearings are similarly situated to persons subjected to guardianship hearings. Section 2-107.1 violates Equal Protection because, created to avoid the guardianship statute, it is an inferior alternative for making treatment decisions for persons who may lack decisional capacity.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that their Petition for Writ of Certiorari be granted.

Respectfully submitted,

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